

Chapter 4. Promoting an open organisational culture in Nuevo León

This chapter considers the mechanisms put in place by Nuevo León to provide public officials advice and guidance when they are confronted with doubts and dilemmas that arise over issues of integrity. It also analyses the dedicated whistle-blowing law that Nuevo León adopted in 2013 to encourage reports of corrupt conduct committed by public officials. This chapter provides a set of recommendations for creating an open organisational culture, as well as improving the impact and effectiveness of the existing legal framework. It recommends that senior leadership play a more central role in stimulating dialogue and communication on integrity-related issues. Furthermore, it calls on Nuevo León to reinforce some aspects of its legal framework, including providing meaningful incentives, and ensuring effective protection in case of reprisals.

The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

4.1. Introduction

A key element in building a culture of integrity in any organisation is to support an open culture that stimulates discussion of integrity-related questions and concerns, and which offers adequate channels for its members to report suspected misconduct without fear of reprisal. The significance of dialogue and openness in the public sector clearly emerges from the *OECD Recommendation of the Council on Public Integrity* (OECD, 2017^[1]). Member countries are encouraged to create a culture where public officials can openly discuss ethical dilemmas and integrity issues with the advice and guidance of the leadership. Meanwhile, clear rules and procedures need to be in place to report and protect suspected violations of integrity standards, and to allow those who come forward to report them in confidence if necessary.

An open organisational culture, responsive to integrity concerns, requires a combination of measures supporting public officials at different levels, including engagement, credibility/trust, empowerment and courage (Berry, 2004^[2]). On the one hand, organisational measures should encourage senior managers to lead by example and to adopt an open-door culture promoting trust. On the other hand, guidance and protection need to be available to facilitate the reporting of misconduct, fraud and corruption.

Providing whistle-blowing protection is a fundamental step for supporting open organisational culture but also for ensuring accountability and uncovering episodes of fraud or corruption that would otherwise be difficult to detect. Public officials, but also employees in the private sector, are exposed daily to the practices of their organisation, and are therefore in a privileged position to notice abuses and recognise wrongdoing (UNODC, 2015^[3]). These elements make whistle-blowing a fundamental element in ensuring an open organisational culture, but also the “ultimate line of defence for safeguarding the public interest” (OECD, 2016^[4]).

This chapter analyses the mechanisms Nuevo León has put in place to promote an open organisational culture in the public sector, and the extent to which they stimulate discussion and reporting of ethical issues and breaches of integrity. It provides recommendations for promoting an open culture in the public administration – especially by Nuevo León’s senior leadership – as well as some insights on how to enhance the current legislative framework laid out in the Whistle-blowing Law adopted in 2013 (*Ley para Incentivar la Denuncia de Actos de Corrupción de Servidores Públicos del Estado de Nuevo León*).

4.2. Creating an open organisational culture

4.2.1. Nuevo León should define clear channels for public officials to ask advice and receive guidance when they are confronted with integrity-related doubts and dilemmas.

The first essential element in creating an open organisational culture in public organisations is to create the right conditions for public officials to freely discuss ethical dilemmas, public integrity concerns and errors (OECD, 2017^[1]). These efforts should be linked to the broader endeavour to instil a culture of integrity in the public sector, as illustrated in Chapter 3. , and also to the need to set up dedicated, well-trained professionals or units responsible and accountable for implementing and promoting ethics and conflict-of-interest policies.

Interviews conducted during the fact-finding mission showed that public officials in Nuevo León are dealing with a fragmented normative framework that can leave them uncertain as to which entity is responsible for ethics in the public sector. This lack of clarity also concerns the question of how they should seek advice or guidance if they face doubts or dilemmas over issues of integrity. Most of the officials interviewed in the fact-finding mission said they were not aware of any office or institution that could offer them advice or guidance if they were confronted with ethical or conflict of interest issues. This finding confirmed the absence of any relevant recourse in the legal framework.

Given the lack of any institution or mechanism responsible for providing guidance on integrity-related issues, Nuevo León could introduce safe channels that offer public officials a communication channel of this kind. The responsibility might be assigned to the Integrity Contact Points, in line with the recommendation in Chapter 1. Their mandate should essentially be limited to a preventive role, focusing on providing guidance rather than processing complaints or disciplinary proceedings. Ensuring separation from the enforcement function is crucial, since ethical guidance needs to be provided in an open environment where public officials can seek advice without fear of reprisal (OECD, 2017^[5]). This is particularly relevant in Nuevo León, where no clear distinction appears to have been drawn between an open organisational culture and the audit and enforcement functions. Some of the officials interviewed suggested that they should seek advice in case of doubts or questions from the Anti-corruption Unit or the Internal Control Units.

4.2.2. Senior officials in Nuevo León should be assigned specific responsibilities to demonstrate ethical leadership and commitment.

The *OECD Recommendation of the Council on Public Integrity* (OECD, 2017^[1]) emphasises that to create a comprehensive integrity system, it is crucial to “demonstrate commitment at the highest political and management levels within the public sector to enhance public integrity and reduce corruption”. This is also a necessary condition for establishing an open organisational culture responsive to integrity concerns. The commitment of leaders to organisational values helps to build trust and create a safe environment where employees can come forward and report their concerns (Berry, 2004^[2]). By leading by example, senior officials and managers build credibility and create the right conditions for employees to discuss ethical dilemmas and treat disclosures of misconduct consistently. This has been recognised in some OECD countries, for example Australia, where leadership is one of the building blocks supporting a corporate culture where organisational values underpin decisions, actions and behaviour (see Box 4.1).

Box 4.1. The Australian Public Service identifies leadership as one of the building blocks for a values-based culture

The Australian Government's Public Service Commission released a guide aimed at assisting agencies to integrate the Australian Public Service (APS) Values (impartiality, ethics, respect, accountability, commitment to service) into its organisational culture and the day-to-day work of all their employees. Building on practice and research, the guide identifies the building blocks for a values-based culture (commitment, leadership, management systems, assurance) and describes the expected outcomes for the APS as a whole, as well as for the individual agencies. The guide is intended as a checklist for measuring progress in establishing a values-based culture.

“Leadership” is identified as one of the four building blocks for integrating the values of the public service into everyday decisions and actions. It is expected to translate into the following outcomes:

- For the APS:
 - Leaders integrate the APS Values into their agency's decision-making processes and culture and consistently reflect the values in their own behaviour.
- For the agency:
 - Leaders take a stewardship role and build the APS Values into the governance practices of their agency and wider APS.
 - Leaders build a culture of trust with employees and agency stakeholders and clients.
 - Leaders model the APS Values, have the highest standards of behaviour and make sound, reliable, fair and ethical decisions.
 - Leaders coach and guide others to take sound, reliable, fair and ethical decisions.
 - Leaders make clear that conduct consistent with the APS Values is expected and deal appropriately and effectively with unacceptable behaviour.
 - Leaders guide employees in understanding the relevance of the APS Values to their day-to-day work.

Source: (Australian Public Service Commission, 2014^[6]).

In Nuevo León, interviews with senior government staff indicated a lack of any practice or formal responsibility to encourage open communication on integrity concerns and the absence of any pro-active initiative to set the tone at the top or to stimulate dialogue on this subject.

The legal framework already stipulates that public entities are required to disseminate whistle-blowing regulation (Article 7 of the Whistle-blowing Law). The Office of the Comptroller and Governmental Transparency (*Contraloría y Transparencia Gubernamental*, or Office of the Comptroller) could thus monitor senior officials' progress in fulfilling this responsibility and more broadly in creating an open organisational culture. This would align Nuevo León's practice with the practice of other OECD countries, which puts special emphasis on the role of senior civil servants in promoting integrity and leading by example. In Canada, for instance, the Public Servants Disclosure Protection Act requires the chief executives of all public sector departments and organisations to appoint senior officers who not only demonstrate a key leadership

role but provide information and advice to employees and supervisors and make recommendations to the chief executive (Box 4.2).

Box 4.2. Canada's ethics policy for senior officials and departmental officers

Senior officials for public service values and ethics

The senior official for values and ethics supports the deputy head in ensuring that the organisation exemplifies public service values at all levels of the organisation. The senior official promotes awareness, understanding and the capacity to apply the code amongst employees, and ensures that management practices support values-based leadership.

Departmental officers for conflict of interest and post-employment measures

Departmental officers for conflict of interest and post-employment are specialists in their respective organisations who have the responsibility to advise employees on the conflict of interest measures in Chapter 2 of the Values and Ethics Code.

Source: (Government of Canada, 2018^[7]).

Another way the senior leadership of Nuevo León could demonstrate its commitment to organisational values and to build organisational expectations for employees is to assign senior officials additional responsibilities to ensure the protection of disclosures. This is mandated by the Australia's Public Interest Disclosure Act 2013, which assigns specific obligations and responsibilities to some actors in the whistle-blowing process, including such senior staff as principal officers (see Box 4.3).

Box 4.3. Obligations of Australia's principal officers

Additional obligations of principal officers

1. The principal officer of an agency must establish procedures for facilitating and dealing with public interest disclosures relating to the agency. The procedures must include:
 - a. assessing risks that reprisals may be taken against the persons who make those disclosures;
 - b. providing for confidentiality of investigative processes.

The procedures must comply with the standards made under Paragraph 74(1)(a) of the Public Disclosure Act.

2. Procedures established under subsection (1) are not legislative instruments.
3. The principal officer of an agency must take reasonable steps:
 - a. to protect public officials who belong to the agency from detriment, or threats of detriment, relating to public interest disclosures by those public officials;
 - b. to make sure that the number of authorised officers of the agency is sufficient to ensure that they are readily accessible by public officials who belong to the agency;
 - c. to ensure that public officials who belong to the agency are aware of the identity of each authorised officer of the agency.

4. The principal officer of an agency must ensure that appropriate action is taken in response to recommendations in a report under Section 51, or any other matters raised in such a report, that relate to the agency.

Source: (Australia, 2013^[8]).

Lastly, openness in the organisation could be motivated by developing the ethical behaviour of public officials at the junior level, who might be assisted by senior managers in this respect through a mentorship programme. This would not only support the future leaders of an organisation to think through situations and develop awareness of ethical issues, but reinforce senior officials' ethical convictions and promote an organisational culture where public officials feel comfortable in reporting wrongdoing (OECD, 2017^[5]). Since Nuevo León does not at present have such a programme, the Comptroller-General could develop a pilot programme creating incentives and rewards for junior and senior staff who qualify and successfully participate in it.

4.2.3. The contribution of senior management toward creating an open organisational culture should be considered in their performance evaluation.

A key element in determining public servants' perceptions and their belief in their leadership's ability to create an open organisational culture is the way leaders communicate what is important by rewarding desirable behaviour, in both formal and informal ways. Managers should not be promoted or rewarded if they are known to tolerate questionable or unethical practices; similarly, they should not be punished or denied career opportunities for creating the conditions for reporting misconduct (Berry, 2004^[2]).

Nuevo León does not at present have a means of rewarding senior managers, or allowing them to reward their staff, for their attitude and actions towards creating an open organisational culture. This can be explained by the fact that the state does not have a general employment framework for the civil service. However, it is currently building a performance management programme (see Chapter 3.) that could be helpful in this respect. Chapter 1. recommended that Nuevo León's existing efforts could be developed to hold senior managers accountable for displaying exemplary behaviour, and similar efforts could be undertaken to encourage an open organisational culture. Such a mechanism could also clearly define expected profiles and behaviour, which could then serve as the basis for selection, development and performance management of senior public officials. Canada's Key Leadership Competencies Profile could be helpful here. This defines the behaviour expected of public service leaders in different roles (deputy minister, assistant deputy minister, director-general and director, as well as manager and supervisor) including a responsibility to "uphold integrity and respect" (see Box 4.4).

Box 4.4. ‘Integrity and Respect’ as part of the Key Leadership Competencies in the Canadian Service

One of the key leadership competences Canadian executives and senior leaders are measured against is to “Uphold integrity and respect”. Leaders are expected to model ethical practices, professionalism and integrity. The goal is to build an open organisational culture where employees are confident in seeking advice, expressing diverse opinions and promoting collegiality.

Examples of effective and ineffective behaviour specified for upholding integrity and respect at the different levels include:

Deputy minister

- Values and provides authentic, evidence-based advice in the interest of Canadians.
- Holds self and the organisation to the highest ethical and professional standards.
- Models and instils commitment to citizen-focused service and the public interest.
- Builds and promotes a bilingual, inclusive, healthy organisation respectful of the diversity of people and their skills and free from harassment and discrimination.
- Exemplifies impartial and non-partisan decision-making.
- Engages in self-reflection and acts upon insights.

Assistant deputy minister

- Values and provides authentic, evidence-based advice in the interest of Canadians.
- Holds self and the organisation to the highest ethical and professional standards.
- Models and builds a culture of commitment to citizen-focused service and the public interest.
- Builds and promotes a bilingual, inclusive, healthy organisation respectful of the diversity of people and their skills and free from harassment and discrimination.
- Exemplifies impartial and non-partisan decision making.
- Engages in self-reflection and acts upon insights.

Director-general

- Values and provides authentic, evidence-based advice in the interest of Canadians.
- Holds self and the organisation to the highest ethical and professional standards.
- Models commitment to citizen-focused service and the public interest.
- Creates opportunities that encourage bilingualism and diversity.
- Advances strategies to encourage an inclusive, healthy organisation, respectful of the diversity of people and their skills and free from harassment and

discrimination.

- Exemplifies impartial and non-partisan decision making.
- Engages in self-reflection and acts upon insights.

Director

- Values and provides authentic, evidence-based advice in the interest of Canadians.
- Holds self and the organisation to the highest ethical and professional standards.
- Models commitment to citizen-focused service and the public interest.
- Creates opportunities that encourage bilingualism and diversity.
- Encourages practices to promote an inclusive, healthy organisation, respectful of the diversity of people and their skills and free from harassment and discrimination.
- Exemplifies impartial and non-partisan decision making.
- Engages in self-reflection and acts upon insights.

Manager

- Values and provides authentic, evidence-based advice in the interest of Canadians.
- Holds self and the organisation to the highest ethical and professional standards.
- Models commitment to citizen-focused service and the public interest.
- Supports the use of both official languages in the workplace.
- Implements practices to advance an inclusive, healthy organisation that is free from harassment and discrimination.
- Promotes and respects the diversity of people and their skills.
- Recognises and responds to matters related to workplace well-being.
- Carries out decisions in an impartial, transparent and non-partisan manner.
- Engages in self-reflection and acts upon insights.

Supervisor

- Values and provides authentic, evidence-based advice in the interest of Canadians.
- Holds self and the organisation to the highest ethical and professional standards.
- Models commitment to citizen-focused service and the public interest.
- Supports the use of both official languages in the workplace.
- Implements practices to advance an inclusive, healthy organisation, that is free from harassment and discrimination.
- Promotes and respects the diversity of people and their skills.
- Recognises and responds to matters related to workplace well-being.
- Carries out decisions in an impartial, transparent and non-partisan manner.
- Engages in self-reflection and acts upon insights.

Examples of generic ineffective behaviour for all roles:

- Places personal goals ahead of Government of Canada objectives.
- Shows favouritism or bias.
- Does not take action to address situations of wrongdoing.
- Mistreats others and takes advantage of the authority vested in the position.

Source: (Treasury Board Secretariat, 2016^[9]); (OECD, forthcoming^[10]).

4.3. Strengthening the whistle-blowing framework

4.3.1. The whistle-blowing law in Nuevo León provides a dedicated framework to encourage and protect reports of corruption.

Providing protection for whistle-blowers is an essential element in supporting an open organisational culture where employees are aware of how to report wrongdoing and have confidence in reporting and the protection and follow-up procedures in effect (OECD, 2016^[4]).

Unlike the legal framework at the federal level protecting public officials and citizens who disclose misconduct in the public sector through various provisions in several laws (OECD, 2017^[11]), Nuevo León has a dedicated whistle-blower protection law adopted in 2013 to promote reports of corrupt conduct of state-level public officials (*Ley para Incentivar la Denuncia de Actos de Corrupción de Servidores Públicos del Estado de Nuevo León*, the Whistle-blowing Law). This instrument introduces procedures and mechanisms to encourage the reporting of corrupt conduct of public officials of the central and semi-public public administration. It also includes a protection programme for public servants or citizens reporting such acts or providing testimony.

The dedicated nature of Nuevo León's Whistle-blowing Law is coupled with a broad subjective and objective scope. It applies to public officials, who are defined as those performing any kind of work, function or duty in the public administration, both at the state and municipal level, and it also applies to citizens. On the other hand, the law identifies an act of corruption as any action or omission committed by public officials in the exercise of their attributions or functions and contravening any obligation established in Article 50 of the Law of Responsibilities of Public Servants of Nuevo León (*Ley de Responsabilidades de los Servidores Públicos del Estado y Municipios de Nuevo León*, or LRSPEMNL), whenever they obtain or intend to obtain undue advantages of any nature, for themselves or for a third party, or accept the promise of such advantages, in exchange for performing or refraining from performing an act in violation of their obligations.

4.3.2. Nuevo León could ensure that the whistle-blowing framework applies outside the executive branch and that the definition of protected disclosure is clarified.

A strength of the Whistle-blowing Law in Nuevo León is that its subjective scope is broadly defined, requiring all public officials and citizens to report acts of corruption and provide them some degree of protection. In OECD practice, a “no loophole” policy is considered an essential element of any whistle-blowing legal framework. This makes it possible to include categories of public employees who are outside the traditional employee-employer relationship (e.g. consultants, contractors, trainees/interns, temporary

employees, former employees and volunteers) (OECD, 2016^[4]). However, Article 28 of the Whistle-blowing Law limits its scope of application to those working in the executive branch, providing that the legislative and judiciary powers as well as the constitutional and autonomous bodies and municipalities of Nuevo León determine that their public officials will be subject to this law and establish administrative bodies under their own jurisdictions accordingly.

Although the limit of applicability of the Whistle-blowing Law may be due to relevant limits of competence set at the constitutional level, such an approach risks fragmenting the scope of whistle-blowing protection. While agreements between the executive power and municipalities (see Chapter 1.) address such issues, there is no account of similar mechanisms with Congress and judicial institutions, which should therefore ensure a homogeneous level of protection to whistle-blowers. Both the legislative and judicial branches have a role in the Local Anti-corruption System of Nuevo León, which also has the authority to improve whistle-blowing channels and could therefore ensure the same level of protection to public officials working in any public institution in the state.

As for disclosures that benefit from legal protection, the scope of the Law includes any act of corruption, which is defined, in turn, as any breach of the obligations laid out in Article 50 of Nuevo León's Responsibilities Law for Public Officials to the extent any act is directed to obtain an undue advantage (see Chapter 3.). While from a formal perspective the definition ensures the coverage of a wide range of unlawful conducts since the reference to the LRSPEMNL includes around 70 obligations, it does not allow a potential whistle-blower to clearly identify conduct whose disclosure would be protected. This could confuse understanding of its scope, especially if one considers that the relevant conducts are only those breaches of Article 50 of the LRSPEMNL that constitute an exchange for an undue advantage. Furthermore, the definition provided in the Whistle-blowing Law does not include breaches of the Code of Conduct and does not make explicit reference to criminal provisions, which also reveals a gap (or the perception of a gap) in the scope of conducts that are subject to whistle-blowing protection.

When defining the scope of protected disclosures, countries should ensure a balance and avoid making the scope too detailed or too broad. An overly detailed approach may allow for too much discretionary choices and become an impediment for those who do not have detailed knowledge of relevant legal provisions. On the other hand, a broad approach may be too vague and discourage people from speaking out openly within the organisation (Banisar, 2011^[12]). To help make the scope of the application of the Whistle-blowing Law more easily comprehensible, Nuevo León could revise its legal framework. A more balanced approach to defining protected disclosures could provide a definition that is clear, comprehensive and also detailed, as set out in the United Kingdom's legislation (see Box 4.5).

Box 4.5. The United Kingdom's definition of the scope of protected disclosure

Disclosures qualifying for protection

(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following:

- (a) that a criminal offence has been committed, is being committed or is likely to be committed,
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,
- (e) that the environment has been, is being or is likely to be damaged, or
- (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part “the relevant failure”, in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

Source: (United Kingdom, 1998^[13]).

4.4. Providing the right incentives to encourage whistle-blowers

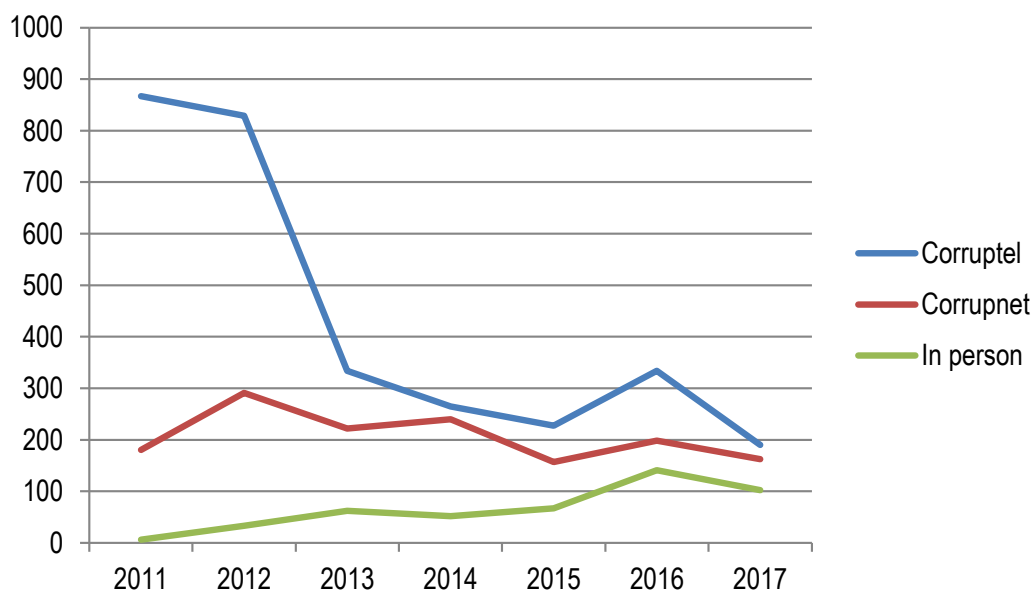
4.4.1. Nuevo León should ensure the availability of internal and external channels for disclosing episodes of corruption.

Each disclosure is linked with specific circumstances, which in turn determine the most appropriate channel of disclosure. Whistle-blowers should have various channels at their disposal and the choice to use the one they trust most to use in the given situation. This also means that channels of reporting should not be limited to a choice of either reporting internally within the organisation or directly to external authorities but should rather operate concurrently (UNODC, 2009^[14]; UNODC, 2015^[3]).

In Nuevo León, according to the Whistle-blowing Law, the only institutional channel for submitting complaints is directed to the Anti-corruption Unit (*Unidad Anti-corrupción*) in the Office of the Comptroller, which receives and follows up complaints. It is also in charge of receiving requests for protection measures related to administrative violations, awarding economic rewards and receiving and expediting complaints for acts of reprisal.

When submitting a disclosure to the Anti-corruption Unit, public officials and citizens have three options: 1) through the Corrupnet website (www.corrupnetnl.mx); 2) by calling the Corruptel telephone number, 070; 3) in person at the Comptroller Office. Official data from the Anti-corruption Unit show that the telephone is used the most, accounting for more than half the complaints submitted (see Figure 4.1).

Figure 4.1. Ways of submitting complaints to the Anti-corruption Unit (2011-2017)



Source: Information provided by the Anti-corruption Unit for reports received from 2011-2017.

The existing whistle-blowing channel directed to the Anti-corruption Unit is increasingly used to report wrongdoing and is gaining citizens' trust. However, Nuevo León does not provide public officials an option for disclosing wrongdoing in their organisation or to an external authority independent of the Executive. Appropriately designed internal channels are an essential prerequisite for any organisation's integrity system in which employees can place their trust, but it also demonstrates integrity leadership and a will to tackle corruption (OECD, 2018^[15]). An unimpeded path, free of reprimand and retribution, can favour an open organisational culture based on a fruitful partnership involving employees and management. Internal reporting is a channel where people feel most at ease to report wrongdoing. In the United Kingdom, for instance, a majority of working adults (83%) indicated that if they had a concern about possible corruption, danger or serious malpractice at work, they would raise it with their employers (Vandekerckhove, James and West, 2013^[16]). In Nuevo León, the lack of internal mechanisms to raise concerns not only prevents public officials from using a reporting channel that is common practice in OECD countries, but also confirms an organisational culture where integrity issues are not freely discussed and where discussing certain practices is not typical. The absence of an open organisational culture – in principle, set by management and infusing the entire organisation – was confirmed during the fact-finding mission. Most of the officials interviewed said they were not aware of any formal or informal mechanism for discussing ethical doubts or raising concerns about integrity in their organisation.

Potential whistle-blowers should also be able to disclose to an external body if they feel that disclosing internally would not lead to an adequate response within a certain

timeframe, or if appropriate action is not taken. They should be allowed to skip the internal element of the disclosure process, if they fear and have reason to believe that they would suffer consequences, such as the reprimand by their organisation's internal mechanism, the loss of their anonymity/confidentiality, or a cover-up of the misconduct. Making external channels directly accessible may also be necessary in the case of a disclosure about an imminent threat or emergency and when internal channels are overly cumbersome (OECD, 2016^[4]). For these reasons, some countries have established separate, independent agencies that can receive, investigate and provide remedies for complaints related to retaliation (Box 4.6).

Box 4.6. Independent central and integrity agencies

Best practices allow for a whistle-blower to report to easily identifiable independent central and integrity agencies. For example:

- “proper authorities”, administrative agency or administrative organ, a public interest disclosure agency, public employment agencies or a “prescribed” person;
- the Auditor-General;
- the Counsel;
- anti-corruption bodies;
- an ombudsman;
- the police and the Director of Public Prosecutions;
- the Public Protector (South Africa);
- relevant policy agencies;
- trade unions.

Source: (Latimer and Brown, 2008^[17]).

To give whistle-blowers the chance to decide whom to make disclosures to, according to individual circumstances, and thus to allow them to make such disclosures with greater confidence, Nuevo León could consider introducing a tiered approach. This would be in line with the practice in some OECD countries, where public sector whistle-blowers may first bring their disclosures to the attention of their employer and use external reporting channels as a last resort (OECD, 2016^[4]). This is the case, for instance, in Canada, where disclosures can be reported to an immediate supervisor, to senior officers responsible for internal disclosures, or to the Office of the Public Sector Integrity Commissioner of Canada. Similarly, in Australia, public interest disclosures can be made: 1) within the government, to an authorised internal recipient or a supervisor, concerning suspected or probable illegal conduct or other wrongdoing, 2) to anybody, if an internal disclosure of the information has not been adequately dealt with, and if wider disclosure satisfies public interest requirements, 3) to anybody, if there is substantial and imminent danger to health or safety, or 4) to an Australian legal practitioner for purposes connected with the first three points. For the internal disclosure Nuevo León could consider giving the responsibility to a senior officer appointed in each organisation, as is the case in Canada

(see Box 4.7). For external reporting, Nuevo León should consider an independent institution highly trusted by citizens and public officials.

Box 4.7. Canada's procedures for internal disclosures

Canada's Public Servants Disclosure Protection Act requires the chief executives of all public sector departments and organisations to appoint senior officers for disclosure of wrongdoing and to establish procedures for the management of disclosures in their organisation. A senior officer in each organisation receives and deals with internal disclosures made under the act. These officials have key leadership roles in the implementation of the act in their organisations and provide information and advice on the legislation to employees and supervisors. They also receive, record and review disclosures of wrongdoing, lead investigations of disclosures, and make recommendations to the chief executive about any corrective measures to be taken in relation to wrongdoing found. Chief executives must provide public access to information about cases of verified wrongdoing resulting from an internal disclosure under the act.

Source: (OECD, 2016^[4]).

4.4.2. The existing arrangements to ensure the confidentiality and security of whistle-blowing information could be reinforced.

There is a lively debate on the desirability of anonymous reporting mechanisms for whistle-blowers. On the one hand, they encourage reporting where there is no open organisational culture and the environment is not prone to whistle-blowers. On the other hand, they may increase the number of reports based on insufficient or unreliable information or even on vindictive and unfounded allegations. In in slightly over half (59%) of OECD countries surveyed, whistle-blowers can report anonymously. However, most whistle-blower protection systems provide for confidential channels protecting the identity of whistle-blowers (OECD, 2016^[4]).

Under Article 11 of its Whistle-blowing Law, Nuevo León provides for the possibility to report anonymously and in such cases, gives the Anti-corruption Unit the discretion to assess the information received and determine whether any action should be taken. The Whistle-blowing Law guarantees the confidentiality of the complainant's identity in these ways:

Reports are recorded in writing and are assigned a special numerical code to identify the complainant.

All public officials in the Anti-Corruption Unit sign a confidentiality agreement, committing them, among other things, to maintain secrecy on the information to which they have access. Staff receiving the complaints through the Corruptel phone number also sign a confidentiality agreement, but its scope is more limited.

No direct reference can be made to the complaint's identity in any subsequent administrative or judicial proceedings, unless expressly provided otherwise.

A register is maintained listing the names and dates of all those with knowledge of a complaint file, to deter them from disclosing that information.

All whistle-blowers' personal data is considered confidential, pursuant to the definition of the Transparency and Access to Information Law of Nuevo León (*Ley de Transparencia y Acceso a la Información del Estado de Nuevo León*).

Public officials or citizens wishing to report anonymously can do so through two of the channels currently available: online and on the phone. With the online reporting mechanism (www.corruptnetnl.mx), the fields on personal details disappear when opting for such possibility, and telephone operators are trained to ask whistle-blowers whether they want to remain anonymous at the beginning of the call and, in that case, ask a limited number of questions. In practice, 70% of the total complaints received so far have been anonymous (see Table 4.1). This was especially the case around 2012-2013, at a time of great insecurity in the state, when many preferred safer reporting channels.

Table 4.1. Types of complaints received by the Anti-corruption Unit

	Identified	Anonymous
Municipalities	439	579
State Public Administration	660	707
Other	99	147
Total	1 198 (57.40%)	1 433 (68.21%)

Source: Information from the Anti-corruption Unit on reports received from 1 November 2011 to 19 May 2017.

Although Nuevo León's whistle-blowing framework emphasises confidentiality and provides for the possibility of making disclosures anonymously, interviews during the fact-finding mission revealed two weaknesses that may undermine the security of the information handled and therefore public confidence in the whistle-blowing system as a whole. Firstly, the confidentiality agreement signed by those working in the Anti-corruption Unit and mentioned in the Whistle-blowing Law does not apply to the staff who receives complaints through the Corruptel phone number, who sign a different agreement. This leaves open the possibility that they do not respect the highest standards of confidentiality in handling complaints. Such gap is particularly meaningful considering that most complaints are submitted through the Corruptel phone number 070 (Table 4.1). A second flaw is that the paper material on each file is stored in boxes in the Comptrollership's Anti-corruption Unit and secured with a standard lock, not under advanced security to protect sensitive information.

Since trust in the whistle-blowing system also depends on the confidentiality and security of related information, Nuevo León should take steps to enhance the existing arrangements and reassure whistle-blowers that the confidentiality of their information is taken seriously. In this sense, it should first extend the obligation to sign a confidentiality agreement to anybody with access to information, including those who receive complaints by phone, and train them adequately on how to ensure the highest standards of confidentiality. Secondly, Nuevo León should reinforce security mechanisms to access whistle-blowing reports in both their paper and digital version. For this purpose, and more generally to ensure the most appropriate level of security measures, Nuevo León could carry out an information security risk assessment based on elements spelled out in EU Regulation No. 45/2001, to ensure the security of data processed by EU institutions (see Box 4.8) and, when necessary, take the necessary steps to mitigate the most significant risks.

Box 4.8. Security of data processing in EU institutions

Article 22: Security of processing

1. Having regard to the state of the art and the cost of their implementation, the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected.

Such measures shall be taken in particular to prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other unlawful forms of processing.

2. Where personal data are processed by automated means, measures shall be taken as appropriate in view of the risks in particular with the aim of:

- (a) preventing any unauthorised person from gaining access to computer systems processing personal data;
- (b) preventing any unauthorised reading, copying, alteration or removal of storage media;
- (c) preventing any unauthorised memory inputs as well as any unauthorised disclosure, alteration or erasure of stored personal data;
- (d) preventing unauthorised persons from using data-processing systems by means of data transmission facilities;
- (e) ensuring that authorised users of a data-processing system can access no personal data other than those to which their access right refers;
- (f) recording which personal data have been communicated, at what times and to whom;
- (g) ensuring that it will subsequently be possible to check which personal data have been processed, at what times and by whom;
- (h) ensuring that personal data being processed on behalf of third parties can be processed only in the manner prescribed by the contracting institution or body;
- (i) ensuring that, during communication of personal data and during transport of storage media, the data cannot be read, copied or erased without authorisation;
- (j) designing the organisational structure within an institution or body in such a way that it will meet the special requirements of data protection.

Source: (European Union, 2001^[18]).

Although Nuevo León's whistle-blowing law provides for criminal consequences for public officials who breach their confidentiality obligations under Article 12, the criminal code provides no explicit penalty for disclosure of the whistle-blower's identity. Nuevo León could introduce one to deter such practices and build trust in the system. This is the case in Australia, which imposes a penalty of six months' imprisonment or a fine for revealing the identity of a whistle-blower (Australia's Public Interest Disclosure Act 2013, Section 20), or Korea, where any person who discloses whistle-blowers' personal information, or other facts that reveal their identity, is punished by imprisonment for up

to three years or fined up to KRW 30 million (Korea's Act on the Protection of Public Interest Whistle-blowers, Chapter V Article 30 (1)).

4.4.3. Current protection programmes and financial rewards provide incentives for whistle-blowers to report, but these could be complemented by labour protection and compensation schemes, and with non-monetary forms of compensation.

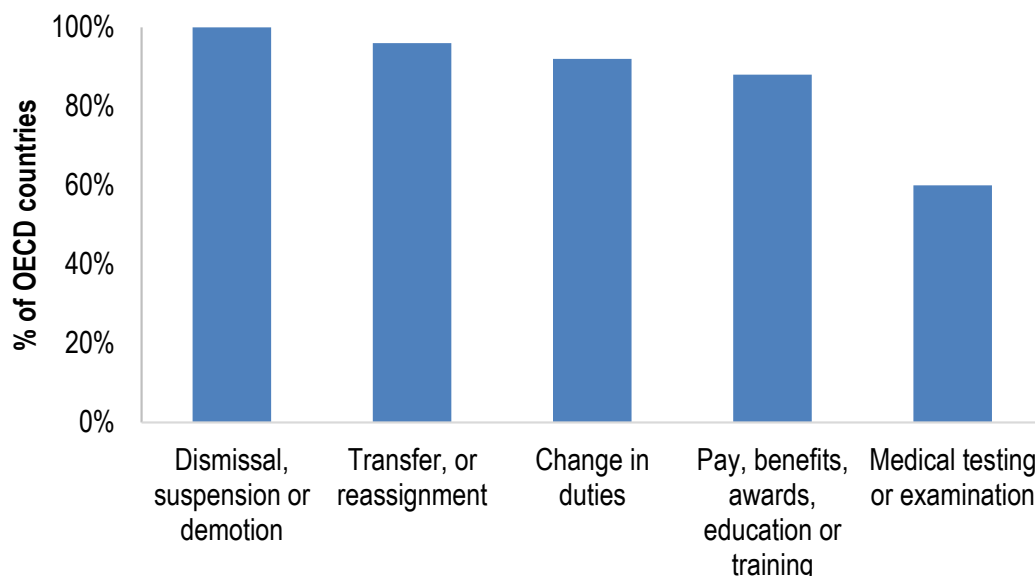
Most whistle-blower protection systems include remedies for whistle-blowers who have suffered or may suffer direct, indirect and future harm as a result of reporting. The decision to report wrongdoing can expose whistle-blowers to retaliation, which often takes the form of disciplinary action or harassment in the workplace. It is thus crucial that any whistle-blower protection framework provide comprehensive protection against discriminatory or retaliatory personnel action (OECD, 2016^[4]). Common measures include return to employment after unfair termination, job transfers or compensation, but also punitive damages if there was harm that cannot be remedied by injunctions, such as difficulty in finding or failure to find a new job (Banisar, 2011^[12]).

While the whistle-blowing framework in Nuevo León prohibits a broad range of retaliatory acts (*actos de hostilidad*) against public officials (Article 6), the corresponding protection measures do not appear to be coherently co-ordinated, leaving a fragmented framework at risk of disincentivising potential whistle-blowers.

On the one hand, as in other OECD countries (see Figure 4.2), Nuevo León's Whistle-blowing Law establishes that public officials may not be unjustifiably and illegally subjected to a number of retaliatory actions, which include:

- dismissal or removal
- delay in promotion
- suspension
- transfer
- reassignment or deprivation of duties
- qualifications or negative reports
- deprivation of rights after reporting or attempting to report acts of corruption.

Figure 4.2. OECD countries providing protection from discriminatory or retaliatory personnel actions



Note: Some countries provide catch-all provisions to qualify for general prohibition of negative consequences or disadvantageous treatment, which were considered to apply to all personnel actions above. In the case of Germany, no specific examples of retaliatory personnel actions are listed. Remedies follow from German Labour Law, Civil Law and Civil Service Law. Based on a ruling by the Federal Constitutional Court, the highest court for German labour law, the Federal Labour Court, has ruled that employees who report in good faith on their company's misconduct generally enjoy protection from dismissal. The European Court of Human Rights substantiated in 2011 employees' right to publicly refer to nuisances at their place of employment (judgement of 21 July 2011, 28274/08). German labour courts must take these judgements into account when making their rulings in future. In Portugal, Article 4 of Law No. 19/2008 states that "workers of the Public Administration and of State owned companies, who report the commission of offences that they have knowledge of in the exercise of their duties or because of them cannot, in any form, including their non-voluntary transfer, be harmed." Respondents were asked the following question: "Are whistle-blowers protected from the following discriminatory or retaliatory personnel actions?"

Source: (OECD, 2016^[4]).

On the other hand, the Whistle-blowing Law in Nuevo León provides for a protection programme that aims to protect whistle-blowers' personal integrity, assets and rights, as well as labour conditions that may be threatened as a consequence of reporting. This framework provides anybody who reports acts of corruption two basic forms of protection: legal assistance in relation to the reported facts, and confidentiality of the personal information provided under Nuevo León's Transparency and Access to Information Law. In addition, Articles 18-20 of the Whistle-blowing Law provide for three sets of additional protection measures that may be discretionally applied by the Office of the Comptroller, depending on whether the person reporting a corrupt act is: 1) a public official; 2) citizens in general; or 3) witnesses (see Table 4.2).

Table 4.2. Protection measures for whistle-blowers in Nuevo León

For public officials	For whistle-blowers in general	For witnesses
<ul style="list-style-type: none"> • Transfer of administrative unit; • Transfer of working location on a case-by-case basis; • Paid leave; (<i>licencia con goce de sueldo</i>) • Other measures decided by the authority 	<ul style="list-style-type: none"> • Forbids the accused person to intimidate or hurt the whistle-blower or any of his/her relatives, directly or through third parties • Other measures decided by the authority 	<ul style="list-style-type: none"> • Preserving their identity in the proceedings, forbidding express mention of their names, surnames, address, place of work, profession or any information that reveals their identity; • Intervention in the proceedings using methods that make it impossible to identify the witness by his/her appearance or voice; • Use of mechanical or technological procedures that avoid the physical participation of the witness in the proceedings; • Identification of an address different from the residence to send notifications about the proceeding; • If the witness is in custody, special protection measures, such as separation from the rest of the prison population or detention in special areas or prisons; • Other measures that the competent authority considers appropriate given the facts of the particular case.

Source: Article 20 of the Whistle-blowing Law.

From a procedural perspective, the Whistle-blowing Law and an *ad hoc* regulation (*Acuerdo por el que se establecen los lineamientos para el otorgamiento de medidas de protección*) identify the Office of the Comptroller as the institution in charge of granting protection to the whistle-blower after submitting a report through one of the available channels. After making a decision on the measures in consideration of a set of criteria (nature and gravity of the case, prior events and relationship between the whistle-blower and the reported authority), the Office of the Comptroller notifies the measure to be implemented to the head of the entity. The same institution can also modify or renew the protections. At any time, its decision can be challenged in front of the Office of the Comptroller itself or, in second instance, through an administrative trial. The legal framework also establishes that the protection should be granted for a minimum of three months, be subject to monthly reviews, and be lifted if it is not considered necessary.

The prohibitions against reprisal and the protection programme introduced by the Whistle-blowing Law represent one of the strengths of the legal framework. They serve as assurance to potential whistle-blowers of the protection they will receive on reporting, or intending to report, a complaint. However, most of the actual protection measures seem to be directed at protecting the personal safety of the whistle-blower, while the protection of labour conditions are only mentioned in general. The exact scope of protection public officials or citizens can receive in case of reporting a breach of integrity is therefore unclear.

Whistle-blowers may suffer a number of consequences in the workplace when reporting misconduct – as recognised on the list of prohibited retaliatory acts. Nuevo León should consider extending the list of protective measures, clearly spelling out the labour conditions and making sure to provide reinstatement, in line with the practice in the majority of OECD countries (see Box 4.9). This would not only ensure a coherent whistle-blowing framework, but increased protection against common retaliatory practices, which very much influence the decision to report a case of corruption.

Box 4.9. Reinstatements on the rise

Over the past two decades, more and more countries worldwide have passed dedicated whistle-blower protection laws. At the same time, NGOs and media organisations supporting whistle-blowers have been established in all regions to help employees save their jobs or be reinstated to positions they have lost because they reported crime and corruption.

These laws and support systems are beginning to work in practice. This is indicated by the growing number of cases in which employees who faced retaliation at work have won back their jobs.

In Europe, these cases include employees who exposed corruption on tax refunds (2015), inadequate child care (2013), overcharging elderly people for housing (2011), academic plagiarism at a university (2008), the neglect of elderly patients (2009), and psychiatric patients who were kept in a locked unit over the Christmas holiday (2012). Additionally, a growing number of employees have received whistle-blower protection status from the government, including seven in two south-east European countries since 2010.

In the Americas, a government employee who exposed fatal inadequacies in military equipment was reinstated in 2011, after a long and high-profile effort by government officials and NGOs.

Among the many other employees who have won reinstatement include those who reported unsafe waste vehicles (2014), a railroad injury (2014), unsafe airplane landings and truck-driving conditions (2013), financial wrongdoing at a large corporation (2012), and lead overexposure and unsafe drinking water (2012).

In Africa, a Justice Department employee was reinstated in 2013 after being fired for reporting corruption; a police colonel was reinstated in 2014 after being fired for uncovering wide-ranging corruption; and a bank finance director was ordered reinstated in 2014 after reporting breaches in corporate governance.

In Asia, two national anti-corruption commissions successfully blocked punitive disciplinary measures taken against employees who reported corruption and irregularities. In another Asian country, an employee of a large multinational company who had reported wrongdoing won the first ever whistle-blower reinstatement case at the country's highest court.

In most of these and other cases, a whistle-blower law alone was not sufficient to achieve a positive outcome. Media attention, NGO support and leadership by key government officials and policy makers were needed to tip the scales in favour of whistle-blowers.

Source: (Worth, 2015^[19]).

In reviewing the list of remedies to emphasise labour protections, Nuevo León could also consider introducing mechanisms of compensation, which should take into account lost wages, but also compensatory damages, moral damages and punitive damages (Banisar, 2011^[12]). This is a remedy in many OECD countries, such as the UK. The total amount of damages awarded under the United Kingdom's Public Interest Disclosure Act in 2009 and 2010 was GBP 2.3 million. The average award in 2009 and 2010 was GBP 58 000

and the highest award GBP 800 000, in the case of John Watkinson vs. Royal Cornwall Hospitals NHS Trust (Vandekerckhove, James and West, 2013^[16]). Nuevo León could also consider the example of Canada, which includes a comprehensive list of remedies addressing key issues for an effective whistle-blowing policy (see Box 4.10).

Box 4.10. Canada's remedies for public sector whistle-blowers

To provide an appropriate remedy to the complainant, the Tribunal may, by order, require the employer or the appropriate chief executive, or any person acting on their behalf, to take all necessary measures to:

- Permit the complainant to return to his or her duties.
- Reinstatement the complainant or pay compensation to the complainant in lieu of reinstatement if, in the Tribunal's opinion, the relationship of trust between the parties cannot be restored.
- Pay to the complainant compensation in an amount not greater than the amount that, in the Tribunal's opinion, is equivalent to the remuneration that would, but for the reprisal, have been paid to the complainant.
- Rescind any measure or action, including any disciplinary action, and pay compensation to the complainant in an amount not greater than the amount that, in the Tribunal's opinion, is equivalent to any financial or other penalty imposed on the complainant.
- Pay to the complainant an amount equal to any expenses and any other financial losses incurred by the complainant as a direct result of the reprisal.
- Compensate the complainant, by an amount of not more than CAD 10 000, for any pain and suffering that the complainant experienced as a result of the reprisal.

Source: (Canada, 2005^[20]).

The second mechanism to incentivise disclosure of corrupt acts in Nuevo León is the economic reward that whistle-blowers may receive if they provide truthful, sufficient and relevant information enabling the identification of a corrupt conduct committed by a public official (Article 16 of the Whistle-blowing Law).

The monetary reward may range from MXN 5 000 to MXN 20 000 and is subject to budgetary availability and to the decision of an Assessment Committee (*Comité Evaluador*). The committee takes into account the criteria defined in the relevant agreement (*Acuerdo por el que se establecen las bases y lineamientos para la entrega de recompensas por denuncias ciudadanas de actos de corrupción*), such as the damage (to the person and to the public) and the gravity of the act. A necessary condition is that the whistle-blower reveals his or her identity and provide a channel of communication.

Providing monetary reward is a mechanism used in other countries to encourage individuals to come forward in the detection of wrongdoing, and in some cases takes the form of financial support, for example living and legal expenses, after retaliation. Korea, for instance, provides significant monetary rewards (up to approximately USD 2.6 million or KRW 3 billion) for whistle-blowers who disclose acts of corruption and help increase the revenue of public agencies. There is debate over whether such rewards improve the effectiveness of whistle-blowing frameworks. On the one hand, the hope of personal gain is not always incompatible with the public interest, and a whistle-blowing law may be

more effective if it relies on individuals with superior moral and ethical values who are willing to risk their career and financial stability. On the other hand, such compensation could generate moral hazards and encourage unsubstantiated complaints. Nuevo León should assess – through internal review of complaints and through the monitoring exercise proposed below – whether such rewards are effective or instead lead to additional complaints, creating an unnecessary burden and expense for the public administration. As for rewards, Nuevo León could ensure that an annual budget is allocated to Assessment Committee (or one of its institutions, such as the Anti-corruption Unit), since monetary rewards are now subject to budget availability and need to be requested by the Assessment Committee to the Secretary of Treasury and Finance (*Secretaría de Finanzas y Tesorería General del Estado*) on a case-by-case basis. On the other hand, if granting financial rewards to whistle-blowers is felt to be counterproductive or of limited efficacy, Nuevo León could consider alternative incentives to encourage disclosures, such as personal distinctions and honorific awards, which can also encourage an open culture in public entities (see Box 4.11).

Box 4.11. Non-monetary reward mechanisms in Israel and Ireland

The whistle-blower protection system in Israel allows the president to award a certificate of merit to a public servant who files a report in good faith, with an inspection body in accordance with procedures, regarding a corrupt act or other infringement of ethical conduct that occurred at his or her workplace, and where the report has been found to have been justified. The certificate is a symbol of public recognition of that person's contribution to ethical conduct in public institutions in Israel. In a similar context, but from a civil society perspective, Ireland's Transparency International chapter has launched a National Integrity Award in 2015, as a symbol of recognition of individuals and organisations that contributed to the public interest by disclosing wrongdoing.

Source: (Transparency International Ireland, 2015^[21]).

4.5. Ensuring effective protection

4.5.1. Nuevo León should ensure that retaliatory actions against whistle-blowers constitute a criminal offence.

One of the means to increase deterrence against the perpetration of retaliatory acts in OECD countries is to provide for criminal sanctions when this takes place. The Whistle-blowing Law of Nuevo León mentions that retaliatory acts will be considered by criminal authorities for cautionary measures and penalties. Furthermore, Article 214bis of the Criminal Code of Nuevo León (and similarly to Section 219 of the Federal Criminal Code) considers as criminal conduct acts of intimidation that take place when a public official, or a person acting on his/her behalf, uses physical violence or moral aggression to intimidate another person, in order to prevent them from reporting or lodging a complaint related to a conduct punishable by law.

Although that provision provides deterrence against acts of reprisals and, contrary to the federal provision, penalises those who retaliate against people who want to report any illegal conduct (and not only criminal conduct), its scope is limited to the reprisals in the form of physical violence or moral aggression, and do not include all those subject to the

Whistle-blowing Law (see paragraph above). Furthermore, the criminal code only punishes conduct by public officials, even though reports may be submitted by any citizen and reprisals may well take place in the private sector.

To enhance the effectiveness of its whistle-blowing framework, Nuevo León should ensure comprehensive criminalisation of retaliation against whistle-blowers. It could consider amending its criminal code in line with Canada's, which explicitly prohibits (425.1) reprisals against whistle-blowers and applies to a broad range of reprisals, which include disciplinary measures against an employee, such as demotion and termination, or measures that otherwise adversely affect the employment of a whistle-blower, or threaten to do so (see Box 4.12).

Box 4.12. Canada's laws on reprisals against whistle-blowers

425.1 (1) No employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so:

(a) with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors; or

(b) with the intent to retaliate against the employee because the employee has provided information referred to in paragraph (a) to a person whose duties include the enforcement of federal or provincial law.

(2) Anyone who contravenes subsection (1) is guilty of:

(a) an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction.

Source: (Canada, n.d.^[22]).

Alternatively, Nuevo León could explicitly penalise those who perpetrate retaliatory acts. In amending its Whistle-blowing Law, it could consider following the example of other OECD countries, which impose penalties ranging from disciplinary action to fines and imprisonment in their dedicated whistle-blowing legislation. Australia's whistle-blower protection system provides for imprisonment for two years, or 120 penalty units, or both, in cases of reprisal against whistle-blowers (Australia's Public Interest Disclosure Act, Subdivision B, Part 2, Section 19). In Korea, the punishment for retaliation varies depending on the type of reprisal (see Box 4.13).

Box 4.13. Sanctions for retaliation in Korea

Under Korea's Protection of Public Interest Whistle-blowers Act, any person who falls under any of the following points shall be punished by imprisonment for not more than two years or by a fine not exceeding KRW 20 million:

1. A person who implemented disadvantageous measures described in Article 2, subparagraph 6, item (a) [Removal from office, release from office, dismissal or any other unfavourable personnel action equivalent to the loss of status at work] against a public interest whistle-blower.
2. A person who did not carry out the decision to take protective measures that had been confirmed by the Commission or by an administrative proceeding.

In addition, any person who falls under any of the following points shall be punished by imprisonment for not more than one year or a fine not exceeding KRW 10 million:

1. A person who implemented disadvantageous measures that fall under any of Items (b) through (g) in Article 2, Subparagraph 6 against the public interest whistle-blower [(b) disciplinary action, suspension from office, reduction in pay, demotion, restriction on promotion and any other unfair personnel actions; (c) work reassignment, transfer, denial of duties, rearrangement of duties or any other personnel actions that are against the whistle-blower's will; (d) discrimination in the performance evaluation, peer review, etc., and subsequent discrimination in the payment of wages, bonuses, etc.; (e) the cancellation of education, training or other self-development opportunities; the restriction or removal of budget, workforce or other available resources, the suspension of access to security information or classified information; the cancellation of authorisation to handle security information or classified information; or any other discrimination or measure detrimental to the working conditions of the whistle-blower; (f) putting the whistle-blower's name on a black list as well as the release of such a blacklist, bullying, the use of violence and abusive language toward the whistle-blower, or any other action that causes psychological or physical harm to the whistle-blower; (g) unfair audit or inspection of the whistle-blower's work, as well as the disclosure of the results of such an audit or inspection; (h) the cancellation of a license or permit, or any other action that causes administrative disadvantages to the whistle-blower].
2. A person who obstructed the public interest over whistle-blowing, etc., or forced the public interest whistle-blower to rescind his/her case, etc. in violation of Article 15, Paragraph 2.

Source: (Korea, 2011^[23]); (OECD, 2016^[4]).

4.5.2. Nuevo León could further define and clarify the process for protection against acts of reprisal.

The whistle-blowing framework establishes that claims concerning acts of reprisal are received by the Office of the Comptroller, which requires the superior of the denounced civil servant to provide a written report on the events alleged by the public official within five working days, and eventually prompt the administrative or criminal authorities to adopt the necessary cautionary measures, as well as the penalties against the responsible

person(s). If reprisal is committed by the superior of the witness or whistle-blower, this would be considered an aggravating factor.

Although the whistle-blowing framework provides explicit protection against a wide range of retaliatory measures, Nuevo León could further ensure the effectiveness of the process protecting against reprisals by clarifying how public officials may submit, in practice, an allegation of reprisal and under what conditions they may expect protection from the state. This could take the form of an Agreement (or *Acuerdo*), as in the protection programmes, and would not only ensure the legal certainty of the process but increase trust in the whistle-blowing system. At the same time, the Agreement could also explicitly reverse the burden of proof in the process, leaving it up to the superior to prove that the action taken against the whistle-blower was not related to the reporting. Although the existing framework already requires the superior to provide a report on the alleged actions of reprisal, the Agreement could explicitly clarify that he or she has the duty to prove the contrary, in line with common practice in other OECD countries. In Norway, for instance, when an employee submits information that gives reason to believe that he or she has been retaliated against as a result of having come forward with a protected disclosure, it is assumed that such retaliation has taken place, unless the employer provides evidence to disprove it (Norway's Working Environment Act, Section 2-5). Lastly, Nuevo León could provide access to the process against acts of reprisals in case retaliatory action is threatened, which often has the same effect as retaliation (OECD, 2016^[4]). Australia follows this practice, and its whistle-blowing protection system also deems it relevant if someone threatens an act of reprisal against a person because of a public interest disclosure (Public Interest Disclosure Act 2013, Part 2, Subdivision B (13)).

4.5.3. To ensure the comprehensive management of whistle-blowing protection, the Anti-corruption Unit and Specialised Anti-corruption Unit of the Attorney-General's Office (Subprocuraduría Especializada en Combate a la Corrupción) should sign an agreement to institutionalize co-ordination processes and best practices.

The current whistle-blowing mechanism in Nuevo León relies on the central role of the Anti-corruption Unit, which not only receives all the reports submitted through the three available means of communication (by telephone, online and in person), but also carries out an initial assessment of the completeness of the information provided, as well as of the nature of responsibility for the facts in the report. In particular, a dedicated staff member in the Anti-corruption Unit assesses the alleged facts and considers whether the file deals with criminal aspects and therefore should be sent to the Specialised Anti-corruption Unit of the Attorney-General's Office (*Subprocuraduría Especializada en Combate a la Corrupción*) to prepare a formal case in front of the Judicial Branch (*Poder Judicial*).

Although the Anti-corruption Unit and the Specialised Anti-corruption Unit of the Attorney-General have established increased ties and co-operation to detect, investigate and eventually punish the reported facts of criminal relevance, interviews during the fact-finding mission revealed that such relationships do not always function effectively and that the Anti-corruption Unit is not always notified of criminal action taken by the Attorney-General's Office in front of the judge. In some cases, information on judicial developments was discovered from media sources. This makes it difficult for the Anti-corruption Unit to monitor the developments of each report and to maintain a

comprehensive view of the whole process and the necessary follow-up in each situation. To resolve this issue, both institutions could sign an agreement to formalise the best practices used so far and make the Anti-corruption Unit aware of the judicial follow-up, if necessary, collaborating on the creation of the judicial file. Further ways to increase co-operation could be discussed within Nuevo León's Local Anti-corruption System, since both institutions participate and have an opportunity to exchange their views on how to improve the effectiveness of the whistle-blowing mechanism and criminal law review of the underlying conduct.

4.6. Increasing awareness and communication

4.6.1. Nuevo León should increase its efforts to improve public awareness of whistle-blowing mechanisms.

In building an open organisational culture based on trust, professionalism and collegiality, communication is essential. Raising awareness among public officials on how to voice concerns when they arise or how they are protected by whistle-blower mechanisms not only highlights the importance of coming forward with ethical dilemmas and suspected wrongdoing but reinforces mutual interest in defending integrity in the workplace and society. One such initiative was conducted by the United Kingdom's Civil Service, which suggests including a statement in staff manuals to assure employees that it is safe to raise concerns (see Box 4.14).

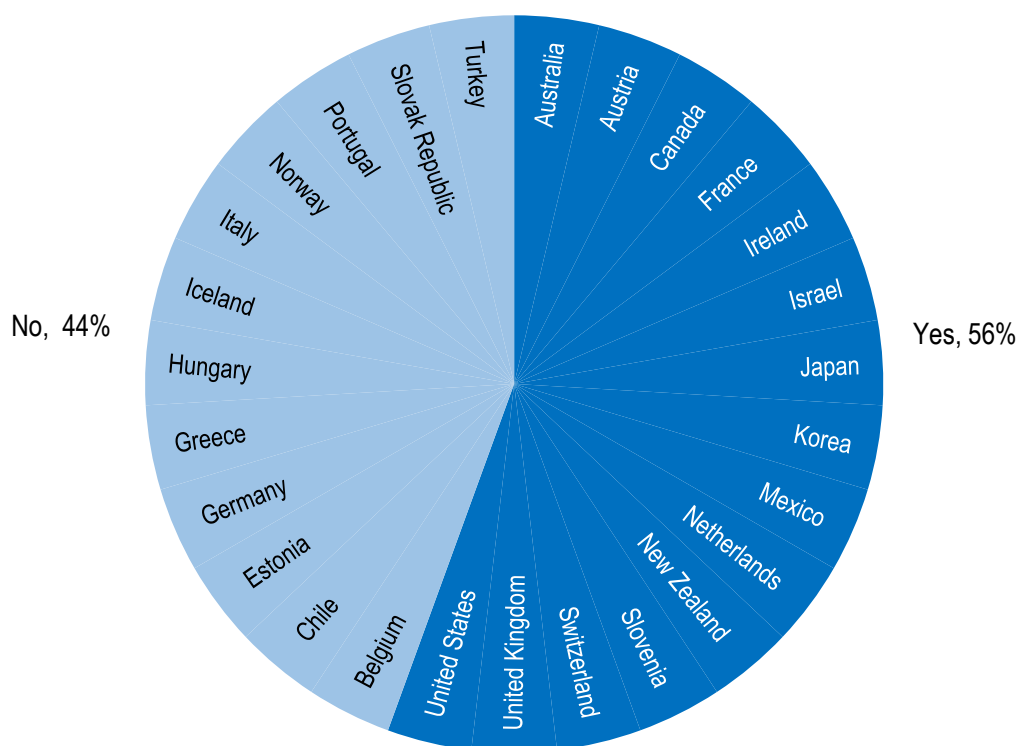
Box 4.14. Reassuring staff that it is safe to raise concerns

“We encourage everyone who works here to raise any concerns they have. We encourage ‘whistle-blowing’ within the organisation to help us put things right if they are going wrong. If you think something is wrong, please tell us and give us a chance to properly investigate and consider your concerns. We encourage you to raise concerns and will ensure that you do not suffer a detriment for doing so.”

Source: (United Kingdom's Civil Service Commission, 2011^[24]).

Communicating to public sector employees their rights and obligations in exposing wrongdoing should be part of the broader efforts that public organisations make to build a culture of integrity, as outlined by the *OECD Recommendation of the Council on Public Integrity* recommending that governments “[p]rovide sufficient information, training, guidance and timely advice for public officials to apply public integrity standards in the workplace” (OECD, 2017^[1]). As for whistle-blowing protection, 15 OECD countries already carry out awareness-raising activities that aim to change cultural perceptions and public attitudes towards whistle-blowers (see Figure 4.3).

Figure 4.3. Public sector informational events on whistle-blower protection in OECD countries



Note: Respondents were asked the following question: “Have any awareness-raising activities, such as manager training, with a view to changing cultural perceptions and public attitudes towards whistle-blowing, been conducted in your country?”

Source: (OECD, 2016^[4]).

In Nuevo León, issues related to whistle-blowing protection are part of the required training on the culture of legality (*cultura de la legalidad*) for public officials (see Chapter 3.). According to the Anti-corruption Unit, from 2013 to 2015 its staff provided certified training to 250 officials, who in turn, replicated the training for 30 000 public officials. Three people from the unit visited 800 groups. Article 7 of the Whistle-blowing Law provides that each public entity set up procedures to disseminate the content of the law among public officials and citizens. Despite these efforts and the legal framework, the Anti-corruption Unit’s work on whistle-blowing protection is not yet well known. Many public officials interviewed in the fact-finding mission, including in sectors at risk, such as public procurement, declared they have little knowledge of the whistle-blowing framework and had not received specific training on such policies and procedures.

Nuevo León should increase its efforts to improve communication on the rights and duties of whistle-blowers. First, it could post information about whistle-blower protection to keep employees informed of their rights on protected disclosures, following the example of the requirements in US federal agencies under the Occupational Safety and Health Act. (OECD, 2016^[4]). The United States also appoints a Whistle-blower Protection Ombudsman in each government agency responsible for educating its employees: 1) about prohibitions on retaliation against protected disclosures; and

2) against those who have made or are contemplating making a protected disclosure about the rights and remedies against retaliation for protected disclosures (Article 117 of the Whistle-blower Protection Enhancement Act). Secondly, Nuevo León could follow the example of Japan's Consumer Affairs Agency, which holds explanatory meetings and symposiums nationwide for business operators, officials and employees, to disseminate knowledge of the Japanese Whistle-blower Protection Act. Lastly, and more generally, it could consider the recommendations proposed in the Open Government Guide to support the Open Government Partnership (see Box 4.15), which stress the importance of reaching not only managers and public officials, but also schools, the private sector and professionals (see Chapter 5.).

Box 4.15. Recommendations of the Open Government Guide to establish a public awareness campaign on the value of whistle-blowing

A/ Establish a public awareness campaign that extends to schools and professional training on the value of whistle-blowing in protecting the public good, the health and safety of people, their environment and their human rights. Distinguish whistle-blowing from informing by ensuring laws to protect whistle-blowers emphasise open or confidential reporting and build on freedom of expression rights.

B/ Provide clear statements and advice on whistle-blowing procedures and protections.

C/ Establish requirements for public sector employers and encourage private sectors employers to establish internal arrangements to facilitate whistle-blowing and to report on these regularly and publicly.

D/ Provide training within organisations to ensure managers are adequately trained to receive reports, and to recognise and prevent occurrences of discriminatory and disciplinary action taken against whistle-blowers.

Source: (Transparency and Accountability Initiative, n.d.[25]).

4.6.2. Nuevo León could show further leadership in whistle-blowing protection by improving its existing data collection.

Another way Nuevo León could demonstrate high-level commitment and determination to create an open culture in the public sector would be to enhance data collection on performance and impact of the whistle-blower framework. This could be coupled with a comprehensive communication strategy seeking participation from the whole of society and providing real-life cases that could appeal to the general public. The government of Nuevo León, through the Anti-corruption Unit, already publishes on a regular basis statistics on the total number of reports received, the number of reports by entity, the typology of alleged facts and the penalties incurred, in the bulletins for reporting progress on the Anti-corruption Plan. Such data-collection tracks some of the indicators suggested in the literature, including: 1) the number and types of public sector disclosures received; 2) the entities receiving most disclosures; 3) the outcomes of cases (i.e. if the disclosure was dismissed, accepted, investigated and validated, and on what grounds); 4) whether the misconduct came to an end as a result of the disclosure; 5) whether the organisation's policies were changed as a result of the disclosure if gaps were identified; 6) whether

penalties were imposed on wrongdoers; 7) the scope, frequency and target audience of awareness-raising and training activities; and 8) the time taken to process cases (Transparency International, 2013^[26]; Apaza and Chang, 2011^[27]; Miceli and Near, 1992^[28]). Nuevo León could build on this by collecting data on the indicators that have not yet been collected. It could also consider using the results of staff surveys, which would not only assess the progress made on the whistle-blowing framework, but demonstrate a commitment to improve awareness, trust and confidence in whistle-blowing protection. The United States' Merit Systems Protection Board, within its annual Federal Employee Viewpoint Survey, includes a question to federal employees exploring their experiences as (potential) whistle-blowers (U.S. Merit Systems Protection Board, n.d.^[29]).

Since it is not clear to what extent data collection by the Anti-corruption Unit has been made known to the general public, Nuevo León could consider increasing its communication efforts in public entities and society. Releasing short, accessible reports with essential data and information, infographics and cases, could be one such initiative. The Ombudsman of the State of Victoria in Australia, for instance, produces a snapshot version of its annual report with a concise description of its work (including its contact information) and an overview of its annual activity in graphs, flowcharts, and boxes (Victorian Ombudsman, n.d.^[30]). The report also describes activities in the community (in schools, universities, community groups, peak bodies), an example Nuevo León could follow to show commitment and promote whistle-blowing in society.

Proposals for action

Promoting an open culture in the public sector not only helps build trust and integrity in public entities, but encourages an effective integrity system responsive to integrity concerns. To enhance the effectiveness of the current framework, mechanisms and practices, Nuevo León could consider the following actions:

Creating an open organisational culture

- Introduce safe channels for offering guidance to public officials on integrity-related issues, ensuring a clear separation from bodies in charge of enforcement.
- Assign the role of providing guidance on integrity to the Integrity Contact Points, in line with the recommendation in Chapter 1.
- Monitor how senior officials fulfil their responsibility to disseminate whistle-blowing regulation (Article 7 of the Whistle-blowing law) and create an open organisational culture.
- Assign specific responsibilities to senior officials to ensure the protection of disclosures by whistle-blowers.
- Develop a pilot programme creating incentives and rewards for both junior and senior staff who qualify and successfully take part in mentorship programmes.
- Include efforts to promote an open organisational culture in the new performance management programme, defining the expected profile and behaviour for selection, development and performance management of senior public officials.

Strengthening the whistle-blowing framework

- Ensure that public officials in all state's branches and throughout government have whistle-blowing channels and protection available.
- Revise the legal framework and adopt a more balanced approach for defining protected disclosures, providing a definition that is clear, comprehensive and detailed.

Providing the right incentives to encourage whistle-blowers

- Introduce a tiered approach, where public sector whistle-blowers may first bring their disclosures to the attention of their employer and use external reporting channels as a last resort. For the internal disclosure, the responsibility could be given to a senior officer, and for the external reporting, an independent institution that has high trust among citizens and public officials.
- Extend the obligation to sign the confidentiality agreement applying to all public officials of the Anti-Corruption Unit to all those with access to information related to whistle-blowing, including those who receive complaints by phone.
- Provide anybody with access to whistle-blowing information training on how to ensure the highest standards of confidentiality.
- Reinforce security mechanisms to access whistle-blowing reports in both their paper and digital version.
- Introduce a specific crime for public officials who breach the confidentiality obligations of Article 12 of the Whistle-blowing Law.
- Extend the list of protection measures, spelling out the rules governing labour conditions and making sure to provide reinstatement, as the majority of OECD countries do.

- Introduce mechanisms of compensation, taking into account lost wages, but also compensatory damages, moral damages and punitive damages.
- Assess whether the existing reward mechanism is effective or instead results in additional complaints, creating an unnecessary burden and expenses for the public administration.

Ensuring effective protection

- Ensure comprehensive protection against retaliatory acts against whistle-blowers, by introducing criminal and disciplinary sanctions in the Criminal Code or Whistle-blowing Law.
- Clarify how public officials may submit an allegation of reprisal and under what conditions they may expect protection from the state. This could take the form of an Agreement (or *Acuerdo*).
- Reverse the burden of proof in the process to seek protection against acts of reprisal, i.e. leaving it to the superior to prove that the action taken against the whistle-blower is not related to his or her reports.
- Provide access to protection against acts of reprisal, if retaliatory action is threatened.
- Sign an agreement with the Anti-corruption Unit and Specialised Anti-corruption Unit of the Attorney-General's Office, to formalise the co-ordination mechanisms developed so far. This should help keep the Anti-corruption Unit abreast of judicial follow-up of cases and, if necessary, to help create the judicial file.
- Develop additional mechanisms to increase co-operation between the Anti-corruption Unit and Specialised Anti-corruption Unit of the General Attorney in the SEANL.

Increasing awareness and communication

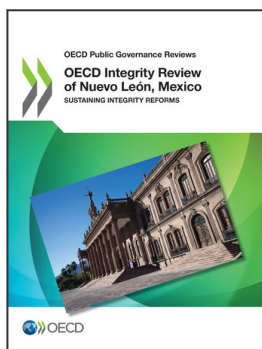
- Increase efforts to improve communication and raise awareness on relevant rights and duties in various ways, such as posting relevant information or introducing a Whistle-blower Protection Ombudsman in each entity.
- Organise explanatory meetings and symposiums for business operators, officials, and employees, and also schools and professionals, to disseminate knowledge and increase public awareness of whistle-blowing protection.
- Ensure comprehensive data collection to create reliable indicators on the performance and impact of the whistle-blower framework and complement it with the results of surveys for staff.
- Increase efforts to disseminate the data collection of the Anti-corruption Unit in public entities and society as a whole.

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